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THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 28.11.2007

+ **ARB. P. 336/2007**

R.K. SILK MILLS (INDIA) LIMITED ... Petitioner

- versus -

NATIONAL INSURANCE COMPAANY LTD. ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Munish Singhvi
For the Respondent : Mr Somesh Arora and Mr Praveen Aggarwal.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

Yes.

BADAR DURREZ AHMED, J (ORAL)

1. By way of this application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the `said Act'), the petitioner has sought the constitution of an arbitral tribunal in terms of Clause 13 of the contract of insurance which was entered into between the petitioner and the respondent.

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2. The respondent had issued a Standard Fire and Special Peril Policy No. 361800/11/05/3100000275 for the year 2005-06. Clause 13 of the said Policy pertains to arbitration and the same reads as under:-

> "13. If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.
>
> It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has disputed or not accepted liability under or in respect of this policy.
>
> It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained."

3. A fire had taken place at the petitioner's Anand Parbat godown on 1.11.2005 which resulted in loss of stock which was owned

by the petitioner. There were certain differences between the petitioner and the Insurance Company with regard to the liability to pay under the Policy as also the assessment of the loss. As a result of which several meetings were held between the petitioner, the surveyors and assessors as well as the respondent. A memorandum of agreement dated 5.3.2007 was entered into between the petitioner and the surveyors of the respondent, namely Mehta and Padamsey Surveyors Private Ltd. In the said memorandum of agreement it was specifically recorded that a meeting was held between Mr R.K. Goel, Director of the Petitioner Company and Mr S. Arunachalam, who was the Director of Mehta & Padamsey Surveyors Private Ltd on 5.3.2007 at Kolkata It is also specifically recorded that the matter was discussed extensively and after mutual clarification/understanding, it was finally agreed to assess the Net Liability of the Insurance Company (respondent herein) as under:-

"Value of the damage in respect of the Prime Quality of the materials Rs 9,440,245.00

75% of the materials returned by the buyers valued at Rs 7,804,604.00 Rs 5,853,453.00

Total Net Liability Rs 15,293,698.00

(Net Liability Rupees One Crore Fifty Two Lakhs Ninety Three Thousand Six Hundred and Ninety Eight only)"

4. The said memorandum of agreement also noted that the above value of assessment was accepted both by Shri R.K. Goel, Director of the petitioner company and the said Mr Arunachalam, on behalf of Mehta and Padamsey Surveyors Private Limited, who was the investigator appointed by the respondent. Based upon these recitals, the following agreement was recorded:-

> "It is hereby declared and agreed by Sri R.K. Goel, Director of R.K. Silk Mills India Limited, that he would obtain the full and final discharge in settlement of Rs 15,293,698.00 from Oriental Bank of Commerce, Karol Bagh Branch, New Delhi who have a lien on the interests insured under the Insurance Policy issued by National Insurance Company Limited.
>
> The Surveyors / Investigators would submit their final report subject to the above terms of agreement and also subject to the terms and conditions of the Policy.
>
> This Joint Memo is drawn strictly without prejudice to rights of anyone concerned and subject to the terms and conditions of the Insurance Policy.
>
> This Joint Memo is drawn in two originals, one of which is retained to Sri R.K. Goel, Director, R.K. Silk Mills Limited and the second copy by the Surveyors.
>
> Dated at Kolkata, the 5th March 2007."

5. On 7.3.2007, the petitioner wrote a letter to the Oriental Bank of Commerce, Karol Bagh Branch, New Delhi, requesting for a re-

structuring of its cash credit account. In that letter, a copy of which had been sent to the respondent, a grievance was made with regard to the amount of Rs 1,52,93,698/- being inadequate for the loss suffered by the petitioner. Thereafter, on 29.3.2007, the respondent made the payment of Rs 1,52,93,698/- by virtue of a cheque of the same date against a receipt issued by the petitioner. The wording of the receipt is material and the same is as under:-

> "Received from National Insurance Co. Ltd., Naraina Divisional Office, the sum of Rupees one crore fifty two lac fifty six thousand eight hundred sixty five only in payment of full & final settlement of claim under Policy No. 361800/11/05/3100000275."

It is an admitted position that the petitioner had received the said amount of Rs 1,52,93,698.00.

6. On 9.4.2007, the petitioner sent a letter to the respondent seeking appointment of an arbitrator in terms of Clause 13 of the said policy. In the said letter the petitioner had stated that on 5.3.2007, the petitioner was constrained to enter into an agreement for Rs 1,52,93,698.00 although this was well below the actual loss suffered by the petitioner. It was further noted in the letter that the said agreement was without prejudice to the rights of any of the parties. It was

contended that since there was a grave dispute about the actual loss of the stocks, the petitioner, having claimed at least Rs 3.5 crores as loss, there is a dispute subsisting between the parties which warrants settlement by way of arbitration in terms of Clause 13 of the said policy. Consequently, the petitioner called upon the respondent to appoint an arbitrator within thirty days of the receipt of the said letter dated 9.4.2007.

7. In response, the respondent sent a letter dated 19.4.2007, stating that there is no dispute between the parties and the question of referring the matter to arbitration did not at all arise. The respondent mentioned in the said letter that the petitioner had given an unqualified discharge of all claims in full and final settlement under the said Policy, upon receipt of the said amount of Rs 1,52,93,698/-. It was also mentioned that the petitioner had signed the memorandum of agreement with Mehta and Padamsey Surveyors Private Limited on 5.3.2007 in which the petitioner had agreed to the final assessment of loss at the said amount. The receipt given by the petitioner had also been referred to.

8. Not being satisfied with the response received from the respondent, the petitioner went ahead and sent a letter dated 4.5.2007 requesting the respondent to nominate its arbitrator inasmuch as the parties could not agree upon the sole arbitrator and, consequently, an arbitral tribunal comprising of three arbitrators was required to be constituted in terms of Clause 13 of the said policy.

9. The respondent sent a reply dated 6.6.2007 through its advocate, stating that arbitration could not be invoked and Clause 13 of the said Policy was not at all attracted in the facts and circumstances of the case, particularly, because the entire transaction stood completed on issuance of the receipt by the petitioner in full and final settlement of all their claims under the policy as indicated above.

10. The learned counsel for the petitioner submitted that the amount of Rs 1,52,93,698/- was accepted and receipt was issued on 29.3.2007 pursuant to the memorandum of agreement dated 5.3.2007 entered into between the parties and the Mehta and Padamsey Surveyors Private Limited. He submitted that the said memorandum of agreement clearly stipulated that the Joint Memo was drawn strictly without

prejudice to their rights and subject to the terms of the insurance policy. Consequently, the receipt of the money and the issuance of the receipt by the petitioner would have to be construed as being without prejudice to the petitioner's rights under the insurance policy which also included Clause 13. Since the petitioner was dissatisfied with the quantum assessed towards the loss incurred during the fire, the petitioner was entitled to have the matter adjudicated through arbitration in terms of the said clause.

11. On the other hand, the learned counsel for the respondent submitted that the arbitration clause permitted arbitration only if there was any dispute or difference with regard to the quantum to be paid under the policy, the liability being otherwise being admitted. A decision on the quantum to be paid under the Policy, in terms of the Clause 13 itself, was to be dealt with independently of all other questions. He submitted that for Clause 13 to be invoked, the pre-condition was that there should be a dispute or difference with regard to the quantum to be paid under the policy. The learned counsel then referred to the memorandum of agreement as well as the receipt issued by the petitioner and stated that even if the submission made by the learned

counsel for the petitioner is kept in the forefront that the said memo of agreement was without prejudice to the rights of the petitioner, the petitioner cannot escape from the fact that the petitioner had accepted the assessment of net liability of the insurance company to be Rs 1,52,93,698/-. Having accepted the said liability as a question of fact, there remained no dispute with regard to the quantum to be paid under the Policy. The learned counsel for the respondent also submitted that having arrived at an agreement by a settlement of the claims, the petitioner cannot be permitted to unilaterally resile from the same and request for arbitration by invoking Clause 13 of the said policy. For this proposition the learned counsel placed reliance on two decisions of the Supreme Court. The first decision was in the case of ***M/s P.K. Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corporation: 1994 Supp (3) SCC 126.*** In that case the Supreme Court observed as under:-

> "Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. In *Russell on Arbitration*, 19th Edn., p. 396 it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defence". Accordingly, we hold that the appellant having

> acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration. The High Court is, therefore, right in its finding in this behalf. The appeals are dismissed but in the circumstances without costs."

12. The second decision of the Supreme Court was in the case of ***Nathani Steels Ltd v Associated Constructions:*** ***1995 Supp (3) SCC 324***. In this case the Supreme Court, having referred to ***P.K. Ramaiah and Company*** *(supra)* and distinguished the case of ***Damodar Valley Corpn. v. K.K. Kar***: ***(1974) 1 SCC 141,*** arrived at a following conclusion:-

> "Even otherwise we feel that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause. We

are, therefore, of the opinion that the High Court was wrong in the view that it took."

13. Having considered the submissions made by the learned counsel for the parties and taken note of the observations of the Supreme Court in the above-mentioned cases, I am of the view that there does not exist any arbitral dispute between the parties which can be referred to arbitration. The reasons are very clear. The petitioner had raised a claim in respect of loss occasioned by the fire which took place at its godown. Initially, there were differences between the petitioner and the respondent both with regard to liability as well as to the quantum of the loss. Subsequently, the respondent admitted its liability but there still remained the dispute with regard to the assessment of loss. A meeting was held between the petitioner and the surveyors of the respondent on 5.3.2007 at Kolkata. That ultimately resulted in the execution of the memorandum of agreement between the petitioner and the said surveyors. The recitals in the said memorandum clearly indicate that the petitioner had accepted the extent of the loss to be Rs 1,52,93,698/-. Therefore, the quantum of the loss also stood crystallized and no further dispute remained with regard to that. To my mind, the expression "this Joint Memo is drawn strictly without prejudice to rights of anyone

concerned and subject to the terms and conditions of the Insurance Policy" would not enable either party to detract from the factual position that the net liability of the insurance company had been agreed to by both the parties and particularly, the petitioner to be Rs 1,52,93,698.00. The dispute which could be referable to arbitration could be only one which pertained to the quantum to be paid under the Policy. Since the quantum stood crystallized, there does not remain any dispute or differences between the parties. It is entirely the another matter that the petitioner may state that the agreement that was arrived at between the parties, was under some misconception or coercion or undue influence. But, that would have to be decided in separate proceedings and cannot be the subject matter of arbitration as has been clearly indicated in ***Nathani Steels Ltd*** *(supra)*. Till the recitals in the memorandum of agreement stands, the petitioner cannot unilaterally raise a dispute and seek reference to arbitration. Consequently, this petition is dismissed."

No order as to costs.

BADAR DURREZ AHMED
(JUDGE)

November 28, 2007
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$~ Single Bench-1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ IA No. 13735/2011 in Arb. P. No. 336/2007

R.K. SILK MILLS (INDIA) LTD ..... Petitioner
Through: Mr Rajiv K. Nanda, Adv.

versus

NATIONAL INSURACNE CO. LTD. ... Respondent
Through: Mr Somesh Arora, Adv.
Mr Sushil Jaswal, Adv.

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED

ORDER
% 27.07.2012

I.A. No. 13735/2011

This is an application for restoration of IA Nos. 7079-7081/2008 which were dismissed in default vide order dated 22.07.2011.

We have heard the learned counsel for the parties. Those applications are allowed and restored to their original numbers.

I.A. Nos. 7079/2008 & 7081/2008 in Arb. P. No. 336/2007

The learned counsel for the applicant states that he has instructions to withdraw these applications in view of the direction already given in the order dated 28.11.2007 to the following effect:-

> "It is entirely another matter that the petitioner may state that the agreement that was arrived at between the parties, was under some misconception or coercion or undue influence. But, that would have to be decided in separate proceedings and cannot be the subject matter of arbitration as has been clearly indicated in **Nathani Steels Ltd** *(supra)*. Till the recitals in the memorandum of agreement stands, the petitioner cannot unilaterally raise a dispute and seek reference to arbitration. Consequently this petition is dismissed."

The learned counsel for the petitioner states that pursuant to that he has already filed a petition before the National Disputes Redressal Commission and he would be pursuing his remedy therein.

The applications stand withdrawn as indicated above.

BADAR DURREZ AHMED, J

JULY 27, 2012
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